UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HERBERT R. PUTZ, et al., Plaintiffs, v. MICHAEL H. GOLDEN, et al., Defendants.	CASE NO. C10-0741JLR ORDER DENYING DEFENDANTS' MOTION TO DISMISS COMPLAINT AND PLAINTIFFS' MOTION TO FILE SUPPLEMENTAL AFFIDAVIT

I. INTRODUCTION

This matter comes before the court on Defendants Michael H. Golden and Suzanne C. Golden's ("the Goldens") motion to dismiss (Dkt. # 10) Plaintiffs Herbert R. Putz ("Dr. Putz") and Panonia Realty Corp.'s ("Panonia") complaint (Dkt. # 1), as well as Plaintiffs' motion to file a supplemental affidavit (Dkt. # 24). Having considered the

motions, as well as all proper submissions filed in support and opposition,[1] and having heard the oral argument of the parties on December 3, 2010 concerning the motion to dismiss, the court DENIES the Goldens' motion to dismiss (Dkt. # 10), and also DENIES Plaintiffs' motion to file a supplemental affidavit (Dkt. # 24).

II. BACKGROUND

For purposes of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court must accept all well-pleaded facts in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Wyler Summit P'ship v. Turner Broad. Sys.*, 135 F.3d 658, 661 (9th Cir. 1998). Those facts, as alleged in the complaint, are as follows.

Twenty-three years ago, in 1987, Dr. Putz and the Goldens contracted for the sale of 18 shares of stock of the Societe Civile Immobiliere Paepaepupure ("SCIP") from the Goldens to Dr. Putz. (Compl. at ¶¶ 3, 22-23 & Ex. A.) The 18 SCIP shares represent a stand-alone bungalow in Bora Bora, French Polynesia ("Bungalow # 12"). (*Id.* at ¶¶ 20, 22.) In the contract, the Goldens promised: (1) to transfer ownership of the 18 shares of SCIP stock to Dr. Putz, and (2) to obtain approval of the share transfer from the SCIP board of directors, as required by SCIP's by-laws and/or governing statutes. (*Id.* at ¶¶ 24, 38.)

In order to obtain SCIP approval, Defendant Michael Golden sent an April 16, 1987 letter to the SCIP board notifying them of the pending transfer of the 18 SCIP

[1] The court details below those submissions of the parties that it is permitted to consider on a Federal Rule of Civil Procedure 12(b)(6) motion. *See infra* § III.B.

shares to Dr. Putz. (*Id.* at ¶ 28, Exs. D & B at ¶ 4.) At the time, Mr. Golden was a member of SCIP's Board of Directors, and the Goldens claim that they obtained approval for the share transfer at the 1987 SCIP Board meeting in Los Angeles, California. (*Id.* at ¶ 28 & Ex. B at ¶ 5.)

In August 1987, the Goldens were the sole shareholders and officers of Panonia. (*Id.* at ¶ 25, Exs. C at 20 & B at ¶ 6.) Dr. Putz understood that the Goldens intended to transfer the 18 SCIP shares representing Bungalow # 12 first to Panonia, and then through Panonia to Dr. Putz. (*Id.* at ¶ 25, Ex. B at ¶ 6.) Dr. Putz believed that the Goldens had transferred the 18 shares to Panonia on September 30, 1987 (*id.* at ¶ 26 & Ex. B at ¶ 6.), and that the Goldens then had assigned all of their shares in Panonia to Dr. Putz on October 2, 1987. (*Id.* at ¶ 27 & Exs. B at ¶ 9 & C.) In return, Dr. Putz alleges that he paid the Goldens $117,500.00 as promised in the contract. (*Id.* at ¶ 29.)

Dr. Putz and Panonia allege, nevertheless, that the Goldens never obtained proper SCIP Board approval for the share transfer, and never properly or validly transferred the 18 shares of SCIP stock to Dr. Putz through Panonia. (*Id.* at ¶¶ 7-8, 39-40.) Plaintiffs allege that from 1987 through 2008 they were unaware of these surprising facts, instead continually operating under the belief that they were the proper owners of the 18 SCIP shares representing Bungalow # 12. (*Id.* at ¶¶ 9, 30-33.) Plaintiffs allege that all parties treated them as if they were the proper owners of the 18 SCIP shares. (*Id.*) For example, SCIP invited Plaintiffs, not the Goldens, to the general assembly of SCIP shareholders. (*Id.* at ¶ 33.) From 1987 to 2008, SCIP sent bills for the bungalow's maintenance and association fees to Plaintiffs, and never to the Goldens. (*Id.* at ¶ 33 & Ex. B at ¶ 9.) Dr.

Putz alleges that he paid these bills totaling $175,151.00, and also paid $25,000.00 for necessary repairs and non-fixture improvements. (*Id.* at ¶ 31.) Dr. Putz alleges that he also openly and regularly used Bungalow # 12 as a rental property over the years. (*Id.* at ¶¶ 32, 46.) Finally, Dr. Putz even served as President of SCIP's Board of Directors for a period of time. (*Id.*, Ex. F at 10.)

In April 2003, Dr. Putz attempted to convert the 18 SCIP shares into a deed for Bungalow # 12. (*Id.* at ¶ 34 & Ex. G at 3.) At that time, SCIP refused to recognize Plaintiffs as the rightful owners of the 18 shares of SCIP. (*Id.* at ¶¶ 9, 35, 39-40.) SCIP took the position that the Goldens had never obtained proper SCIP Board approval for the share transfer from the Goldens to Panonia, and therefore, neither Dr. Putz, nor Panonia, was the rightful owner. (*Id.* at ¶¶ 9, 39-40.)

Consequently, Plaintiffs sued SCIP in French Polynesia. (*Id.* at ¶¶ 41-42, 44.) The Goldens represented to Dr. Putz that they had properly performed on the contract, and at one point during the litigation in French Polynesia, the Goldens agreed to assist Dr. Putz with his suit. (*Id.* at ¶ 43.) In 2005, Mr. Golden executed an affidavit, swearing under oath that the Goldens had obtained proper SCIP Board approval of the share transfer to Plaintiffs, and that they had validly transferred the 18 shares to Plaintiffs. (*Id.*) Ultimately, Plaintiffs' suit in French Polynesia failed at the trial court level (*id.* at ¶ 41), and was appealed and remanded to the lower court (*id.* at ¶ 44). The parties are in dispute concerning the present state of the litigation in French Polynesia, but Plaintiffs have alleged that "[n]o further action has occurred in the French Polynesian litigation." (*Id.*)

Between May 2005 and January 2009, the Goldens and Dr. Putz had ongoing communications through email and telephone conversations, and the Goldens attempted to assist Dr. Putz to complete the SCIP share transfer agreed to in their 1987 contract. (*Id.* at ¶ 45.) Indeed, Plaintiffs have appended to their complaint the transcript of a 2009 hearing before a magistrate judge in the Western District of Virginia, in which Mr. Golden testifies that the subject matter of those conversations and emails was "the continuing effort" on the part of "both" Dr. Putz and the Goldens "to get the transaction completed." (*Id.*, Ex. F at 39-40. [2])

Plaintiffs allege that, in 2008, the Goldens suddenly stopped assisting Dr. Putz, and refused to fulfill their contractual obligations to transfer ownership of the 18 shares

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[2] The actual exchange during the hearing was as follows:

> Q: . . . [B]efore the filing of the [Virginia] lawsuit, [Dr. Putz] had other conversations with [Mr. Golden]. . . . Is that correct?
>
> A: Correct.
>
> Q: Was the subject matter of those conversations and the e-mails the continuing effort on [Dr. Putz's] part to get the transaction completed?
>
> A: On both our parts.
>
> ********
>
> Q: I believe the answer was, on both our parts, that was the purpose. Isn't that what you said?
>
> A: Yeah.

(Compl., Ex. F (attaching the May 28, 2009 transcript of an evidentiary hearing, in Civil Cause No. 3:09cv0003, before the Honorable B. Waugh Crigler, United States Magistrate Judge for the Western District of Virginia) at 39-40.)

of SCIP and to secure approval for the transfer from SCIP's Board. (*See id.* at ¶ 47.) Eventually, SCIP ousted Dr. Putz from possession of Bungalow # 12, a fact that Plaintiffs allege they repeatedly communicated to the Goldens. (*Id.* at ¶ 46.) Plaintiffs allege that the Goldens have admitted that SCIP has told them that they are currently the owners of the disputed 18 SCIP shares. (*Id.* at ¶ 48 & Ex. G at 6 n.4.) Plaintiffs also allege that in communications with SCIP and its agents, the Goldens acknowledged and acted as if they were the owners of the 18 SCIP shares representing Bungalow # 12. (*Id.* at ¶ 48.) In August 2008, SCIP began sending the Goldens invoices for maintenance and association fees related to Bungalow # 12. (*Id.* at ¶ 49.)

Plaintiffs allege that the Goldens could arrange for the redemption of the 18 SCIP shares representing Bungalow # 12, and that this share to deed transfer would not require SCIP Board approval. (*Id.* at ¶ 51.) Plaintiffs further allege that the Goldens could then transfer the deed to Dr. Putz, fulfilling their contractual obligations. (*Id.*) Plaintiffs allege that the Goldens continue to refuse to perform this transaction. (*Id.*)

In 2009, Plaintiffs filed suit in the Western District of Virginia (which is Plaintiffs' resident district) against the Goldens, who are residents within the Western District of Washington. On December 31, 2009, the court in the Western District of Virginia dismissed Plaintiffs' action on grounds of lack of personal jurisdiction over the Goldens. (*Id.*, Ex. G.)

Plaintiffs filed the present proceeding in the Western District of Washington (where the Goldens reside) on April 30, 2010. Plaintiffs have alleged causes of action for (1) breach of contract (*id.* at ¶¶ 54-64), (2) breach of the implied covenant of good faith

and fair dealing (*id.* at ¶¶ 65-68), (3) negligent misrepresentation (*id.* at ¶¶ 69-76), (4) intentional interference with property (*id.* at ¶¶ 77-83), (5) intentional interference with business expectancy (*id.* at ¶¶ 84-94), and (6) declaratory judgment (*id.* at ¶¶ 95-98).

The Goldens have moved to dismiss the complaint on several grounds, including international comity or abstention, lack of ripeness, a forum selection clause, forum non conveniens, expiration of the various applicable statutes of limitation, the economic loss doctrine (now denominated the independent duty doctrine), and failure to state valid causes of action with regard to tortious interference with property or trespass, and tortious interference with business expectancies.

III. ANALYSIS

A. Standards

The Goldens assert that they are bringing their motion pursuant to Federal Rules of Civil Procedure 12(b)(3), 12(b)(4), 12(b)(5), and 12(b)(6). (Mot. at 4.) Rules 12(b)(4) and 12(b)(5) relate to defenses based on insufficient process and insufficient service of process, respectively. Fed. R. Civ. P. 12(b)(4) & (5). The Goldens have made no arguments and presented no evidence with regard to these defenses in their motion, and thus the court considers their motion under the precepts of Rules 12(b)(3) and 12(b)(6) only.[3]

[3] Plaintiffs also note (Resp. (Dkt. # 18) at 2, n.1) that summons were issued (Dkt. ## 1, 2) that contained all necessary elements, *see* Fed. R. Civ. P. 4(a) & (b), and that service of process was executed personally and individually on both of the Goldens (*see* Dkt. ## 8 & 9), satisfying Fed. R. Civ. P. 4(c) and (e).

A motion to dismiss based on a forum selection clause is construed as a Federal Rule of Civil Procedure 12(b)(3) motion to dismiss for improper venue. *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir. 2004). On a Rule 12(b)(3) motion, the allegations in the complaint need not be accepted as true, and the court may consider facts outside the complaint. *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1137 (9th Cir. 2004). Nevertheless, the court "must draw all reasonable inferences in favor of the non-moving party and resolve all factual conflicts in favor of the moving party." *Id.* at 1138.

The remainder of the Goldens' motion may be considered as a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). When considering a motion to dismiss under Rule 12(b)(6), the court construes the complaint in the light most favorable to the non-moving party. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). The court must accept all well-pleaded facts as true and draw all reasonable inferences in favor of the plaintiff. *Wyler Summit*, 135 F.3d at 661. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949. Dismissal under Rule 12(b)(6) can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a

cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

B. Materials the Court Considers

Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion to dismiss. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). The Ninth Circuit has carved out three exceptions to this rule. First, a court may consider material properly submitted as a part of the complaint. *Id.* Second, a court may consider documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to the pleading. *Id.* at 454. Third, a court may take judicial notice of matters of public record. *Id*. This court, therefore, properly considers the documents attached to Plaintiffs' complaint in its evaluation of the Goldens' motion to dismiss.[4]

However, the Goldens have also moved for dismissal based on improper venue. As noted above, for this portion of the Goldens' motion, the court may consider matters outside the pleadings. *Murphy*, 362 F.3d at 1137. In addition, "[t]he court may accept declarations outside the pleadings to decide [a motion based on] forum non conveniens." *U.S. Vestor, LLC v. Biodata Info. Tech. AG*, 290 F. Supp. 2d 1057, 1062, n.1 (N.D. Cal. 2003) (citing *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988); *AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 589-591 (9th Cir. 1996)).

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[4] The court also notes that the transcript of an evidentiary hearing and the memorandum opinion of the United States District Court for the Western District of Virginia that are attached to Plaintiffs' complaint (*see* Compl., Exs. F & G) are also matters of public record.

Along with their motion, the Goldens submitted the declaration of Howard Hall attaching a certified translation of Exhibit E to Plaintiffs' complaint, a copy of the complaint (which has now been dismissed) filed by Plaintiffs against the Goldens in the Western District of Virginia, and a portion of SCIP's 1977 Articles of Association. (Dkt. 10-1.) While the second exhibit passes muster as a public record permissible for consideration in the context of a Rule 12(b)(6) motion, the first and third do not. Thus, while the court may consider all of the exhibits with regard to the Rule 12(b)(3) or forum non conveniens portions of the Goldens' motion, the court may only consider the second exhibit with regard to those portions of the motion brought pursuant to Rule 12(b)(6).[5]

The Goldens also submitted a supplemental declaration from Mr. Hall (Dkt. # 23), along with their reply memorandum (Dkt. # 22). This declaration attaches the July 2, 2009 Report and Recommendation ("R&R") of the magistrate judge in the Western District of Virginia litigation, which is a public record that the court may properly consider in the course of determining a Rule 12(b)(6) motion.[6]

Along with their response to the Goldens' motion to dismiss, Plaintiffs submitted the declaration of Steven W. Fogg, which attaches a declaration by Meredith L. Rugani regarding the status of the legal proceedings in French Polynesia, as well as copies of various communications between Dr. Putz, Panonia, the Goldens, and a representative of

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[5] Nevertheless, the court notes that none of these exhibits have had any bearing on its resolution of any portion of the Goldens' motion.

[6] Again, the court notes that none of the information contained in the R&R was pertinent to the court's resolution of any portion of the Goldens' motion.

SCIP. (Fogg Decl. (Dkt. # 19).) The court did not consider Mr. Fogg's declaration in rendering its decision to deny the Goldens' motion to dismiss, because (as indicated by the authorities cited above) to do so would have been improper in the context of a Rule 12(b)(6) motion to dismiss, and because it is unnecessary for resolution of the issues before the court. For the same reasons, the court denies Plaintiffs' motion to for leave to file an additional supplemental affidavit from Mr. Fogg (Dkt. # 24).

C. International Comity or Abstention

The Goldens assert that the litigation between Panonia and SCIP in French Polynesia is ongoing, and that based on the principles of "international comity" this court should abstain from exercising its jurisdiction and dismiss the present suit. (Mot. at 6-9.) The parties dispute whether or not the litigation in French Polynesia is continuing or has been terminated. Plaintiffs insist that the action "remains permanently terminated today." (Resp. (Dkt. # 18) at 5; *id.* at 6 ("There is no [French Polynesian] litigation pending.").)[7] However, the factual dispute is of no relevance here because even if the litigation in French Polynesia were ongoing, it would provide no basis for the court's exercise of abstention.

"Comity is a recognition which one nation extends within its own territory to the legislative, executive or judicial acts of another." *In re Grand Jury Proceedings*, 709 F. Supp. 192, 195 (C.D. Cal. 1989) (quoting *Somoportex Ltd. v. Philadelphia Chewing Gum*

[7] The Complaint alleges as follows: "On appeal, . . . the Court of Appeal of Papeete, Civil Chamber remanded the case to a lower court. No further action has occurred in the French Polynesian litigation." (Compl. at ¶ 44.)

Corp., 453 F.2d 435, 440 (3d Cir. 1971)). As a matter of comity, United States courts enforce the judgments of a foreign court unless those judgments "are the result of outrageous departures from our own motions [sic] of 'civilized jurisprudence.'" *British Midlands Airways Ltd. v. Int'l Travel, Inc.*, 497 F.2d 869, 871 (9th Cir. 1974) (citing *Hilton v. Guyot*, 159 U.S. 113, 205 (1895)). Application of the principles of international comity "is limited to cases in which 'there is in fact a true conflict between domestic and foreign law.'" *In re Simon*, 153 F.3d 991, 999 (9th Cir. 1998) (quoting *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993)). Where there is only the possibility of an inconsistency between a future judgment of a domestic court and future judgment of a foreign court, there is no "true conflict." *See Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134, 1156 (C.D. Cal. 2005). In such cases, "[t]he potential of conflicting findings is more properly characterized as raising the issue of international abstention rather than international comity." *Id.* at 1157.

In the instant case, the court finds that there is no "true conflict." Since this court has not made any findings of liability or provided any remedies, there is no present conflict between the instant case and any proceedings that may be ongoing in French Polynesia. In other words, there is no reason to believe that the Goldens could not comply with an order or judgment of this court. *See In re Grand Jury Proceedings*, 40 F.3d 959, 964 (9th Cir. 1994) ("A party relying on foreign law to contend that a district court's order violates principles of international comity bears the burden of demonstrating that the foreign law bars compliance with the order.") (citing *In re Grand Jury Proceedings (Shams)*, 873 F.2d 238, 239-40 (9th Cir. 1989)). However, the court

acknowledges that there is the possibility of an inconsistency between a future, potential judgment of this court, and a judgment of the French Polynesian court (assuming those proceedings are still ongoing). Thus, here, the potential for conflicting findings is more properly characterized as raising an issue of international abstention rather than international comity. While the overlap between the two doctrines is substantial, international abstention is more focused on parallel judicial proceedings such as may occur here. *Mujica*, 381 F. Supp. 2d at 1157.

The Ninth Circuit has indicated that international abstention analysis should be guided by principles set forth by the Supreme Court in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). *See Neuchatel Swiss Gen. Ins. Co. v. Lufthansa Airlines*, 925 F.2d 1193, 1194-95 (9th Cir. 1991) (vacating district court's stay of action in deference to parallel proceedings in Geneva, Switzerland pursuant to the Colorado River doctrine). In *Colorado River*, the Supreme Court made clear that:

> [a]bstention from the exercise of federal jurisdiction is the exception, not the rule. The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where . . . [it] would clearly serve an important countervailing interest.

Colorado River, 424 U.S. at 813 (internal quotations omitted).

Federal courts have a "virtually unflagging obligation" to exercise the jurisdiction they have been given. *Id.* at 817. The *Colorado River* doctrine requires exercise of

jurisdiction absent exceptional circumstances because "requiring federal court dismissal would give litigants a powerful tool to keep cases out of federal court . . . by filing a parallel suit [elsewhere and] would frustrate the ability of federal courts to adjudicate cases involving American law." *Mujica*, 381 F. Supp. 2d at 1157 n.12 (internal quotations omitted). Accordingly, the "mere potential for conflict in the results of adjudications, does not, without more, warrant staying exercise of federal jurisdiction." *Colorado River*, 424 U.S. at 816. The Ninth Circuit has rejected the idea that federal courts should abstain simply because parallel proceedings are taking place in a foreign court, even if more progress has been made in the foreign proceeding. *See Neuchatel*, 925 F.2d at 1195. "[C]onflicting results, piecemeal litigation, and some duplication of judicial effort is the unavoidable price of preserving access to . . . federal relief." *Id.* (quoting *Tovar v. Billmeyer*, 609 F.2d 1291, 1293 (9th Cir. 1979)).

The factors to consider in determining whether a *Colorado River* stay is appropriate, include: (1) whether either court has assumed jurisdiction over a *res*, (2) the relative convenience of the forums, (3) the desirability of avoiding piecemeal litigation, (4) the order in which the forums obtained jurisdiction, (5) what law controls, and (6) whether the foreign proceeding is adequate to protect the parties' rights. *See Nakash v. Marciano*, 882 F.2d 1411, 1415 (9th Cir. 1989). "These factors are to be applied in a pragmatic and flexible way, as part of a balancing process rather than as a 'mechanical checklist.'" *Id.* (quoting *Am. Int'l Underwriters, (Philippines), Inc. v. Continental Ins. Co.*, 843 F.2d 1253, 1257 (9th Cir. 1988). The Goldens have asserted that the balance of these factors weigh in favor of dismissal. (*See* Mot. at 6-9.)

However, if there is substantial doubt as to whether the foreign proceeding will resolve the federal action, there is no need to even undertake this multifactor analysis. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 12 F.3d 908, 913 n.7 (9th Cir. 1993).

> When a district court decides to dismiss or stay under *Colorado River*, it presumably concludes that the parallel [] litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties. If there is any substantial doubt as to this, it would be a serious abuse of discretion to grant the stay or dismissal at all.

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 28 (1983); *see also Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 277 (1988) (declaring that a district court may enter a *Colorado River* stay only if it has "full confidence" that the parallel proceedings will end the litigation). Thus, "the existence of a substantial doubt as to whether the [other] proceedings will resolve the federal action precludes the granting of a stay." *Intel*, 12 F.3d at 913.

In *Intel*, the Ninth Circuit found that there was sufficient doubt to preclude a *Colorado River* stay because the concurrent state court proceedings would only resolve all of the issues in the federal action if it confirmed an arbitration award. 12 F.3d at 913. If, instead, the state court overturned the arbitration award, the case would need to return to federal court for further adjudication. *Id.* Consequently, there was substantial doubt that the state court proceedings would completely resolve the issues in the federal action, and a stay was not justified. *Id.* Likewise, in *Smith v. Central Ariz. Water. Conservation Dist.*, 418 F.3d 1028, the Ninth Circuit found that the *Colorado River* doctrine did not apply because, in the state court action, the plaintiff's sought a determination of their rights under different contracts than those at issue in the federal court action. *Id.* at 1033.

Applying this reasoning to the case at hand,[8] the court lacks full confidence and finds substantial doubt that the French Polynesian proceedings would resolve all of the issues in this action. The Goldens and Dr. Putz are not even parties to the French Polynesian litigation, which involves only SCIP and Panonia. (*See* Compl., Ex. G (attaching Memorandum Opinion of the District Court for the Western District of Virginia) at 3 (". . . Panonia brought suit against SCIP in French Polynesia.").) Further, the French Polynesian dispute focuses on resolution of the parties' rights and the proper transfer of shares under SCIP regulations. (*Id.* ("The courts of French Polynesia apparently found that the shares . . . had not been properly transferred according to SCIP regulations. . . .").) Here, the dispute is grounded in a contractual conflict between Dr. Putz and Panonia, on one hand, and the Goldens, on the other. Certainly, the issues of whether or not the Goldens breached their contract with Plaintiffs, breached their covenant of good faith and fair dealing, or committed any number of other alleged torts do not appear to be issues that have been or will be addressed by the French Polynesian court. *See Ekland Marketing Co. of Calif., Inc. v. Lopez*, No. CIV. S-05-0761 FCD/GGH, 2007 WL 2288319 at *4 (E.D. Cal. Aug. 8, 2007) (denying motion to stay proceedings pursuant to international abstention doctrine pending outcome of Spanish

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[8] In *Intel*, the Ninth Circuit considered whether it was appropriate to stay a federal court action pending state court proceedings, rather than proceedings in a foreign court. 12 F.3d at 913. However, the Ninth Circuit has made clear that this difference is immaterial. *See Neuchatel*, 925 F.2d at 1195 ("[T]he fact that the parallel proceedings are pending in a foreign jurisdiction rather than a state court is immaterial. We reject the notion that a federal court owes a greater deference to foreign courts than to our own state courts.").

proceedings where contracts at issue in the two matters were different, and complaint in federal court also alleged tort claims not at issue in Spanish proceeding).

Because there is "substantial doubt as to whether the [other] proceedings will resolve the federal action," the court is precluded from granting the Goldens' motion to stay or dismiss pursuant to the international abstention doctrine." *See Intel*, 12 F.3d at 913. Further, because the Ninth Circuit has found that this factor is dispositive, "it is unnecessary for [the court] to weigh the other factors included in the [] analysis." *See id.* at 913 n.7.[9] The court denies the Goldens' motion to dismiss or stay this action based on notions of international comity or the international abstention doctrine.

D. Ripeness

The Goldens' argument that Plaintiffs' complaint and the present dispute is not ripe for consideration is without merit. "The basic rationale of the ripeness doctrine is to prevent courts, through avoidance of premature adjudication, from entangling themselves

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[9] Even if the court were to consider these factors, however, the analysis would weigh against granting a staying or dismissing the case. Although the 18 SCIP shares at issue in the French Polynesian litigation relate to a specific bungalow, as far as the court can discern on the basis of this motion to dismiss, those shares are still simply shares in a partnership or association. Indeed, Plaintiffs have alleged that despite their efforts to the contrary there has never been a share-to-deed transfer with regard to Bungalow # 12. (Compl. at ¶ 51.) Thus, contrary to the Goldens' assertions (Mot. at 8-9), at this point, there is no indication that the French Polynesia court "has assumed jurisdiction over a res." *Nakash*, 882 F.2d at 1415. Further, this is the Goldens' home forum, and the Plaintiffs' chosen forum. In this action involving an alleged breach of contract between these parties, the court is not convinced that French Polynesia is the more convenient forum, *see id.*, or that Plaintiffs would even be able to obtain jurisdiction over the Goldens in that forum. In addition, irrespective of the outcome of the French Polynesian action, the court would still likely have to engage in piecemeal litigation because resolution of that action is not determinative of this one. *Id.* With regard to the remaining factors, the court finds that they are either neutral or unknown at this point in the litigation. Thus, even applying the factors relevant to an international abstention analysis, the court finds that there is no grounds for abstention here.

in abstract agreements." *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 662 (9th Cir. 2002) (internal quotation marks omitted). The current dispute is not abstract or hypothetical. Plaintiffs allege that the Goldens have breached a contract (Compl. at ¶¶ 54-64) and committed various torts (*id.* at ¶¶ 69-94), and that as a result Plaintiffs have suffered present damage in an amount of at least $517,571.00 (*id.* at ¶ 99(a)). The dispute is ripe for consideration, and the court denies the Goldens' motion for dismissal based on this ground.

E. Forum Selection Clause

The Goldens assert that Plaintiffs should be bound by the forum selection clause contained within the SCIP Articles of Association. (Mot. at 10.) The forum selection clause states:

> Any claim which may arise during the duration or the liquidation of the Company, related to Company matters, or among the partners themselves, or between the Company and the partners, or between surviving partners and the heirs, assigns or representatives of a deceased partner, shall be judged by the courts which have jurisdiction over the area in which the real property is located.

(Hall Decl. (Dkt. 10-1), Ex. C.) For the following reasons, the court denies this portion of the Goldens' motion.

First, the court notes that although SCIP has been named as a defendant in this matter, at this time, it has made no appearance. The only parties presently before the court are Plaintiffs and the Goldens. In this matter, Plaintiffs are asking the court in part to determine whether the Goldens breached their contract to Plaintiffs to sell or transfer 18 shares of SCIP, and to "arrange that the [SCIP] Board of Directors will approve the

transfer of the stocks as required by the By-laws of the Corporation." (*See* Compl., Ex. A at 3.) Plaintiffs are also alleging tort and other claims arising out of or following this initial underlying contractual dispute. Based on the allegations here, only one of these parties – either the Goldens or Plaintiffs – can be a SCIP partner at any one time, not both. In their complaint, Plaintiffs allege that they have been "ousted by SCIP" (Compl. at ¶ 46), and that according to SCIP the Goldens "are currently the owners of the eighteen SCIP shares" in dispute (*id.* at ¶ 48). The by-laws or other governing "statutes" of SCIP are relevant here to the extent that they shed light on Plaintiffs' allegations or the Goldens' defenses, but because both Plaintiffs and the Goldens cannot be members of SCIP simultaneously, these "statutes" would not govern the relationship between these specific parties. Rather, the operative contract here with regard to any forum selection clause would be the one between the Goldens and Plaintiffs. Neither party is alleging that this 1987 contract contains a forum selection clause, and thus the court denies the Goldens' motion for dismissal on this ground.

Even if the forum selection clause found in the SCIP Articles of Association were applicable, however, the court would decline to enforce it here. The court analyzes the following factors to determine whether a forum selection clause is reasonable: (1) whether the clause was incorporated into the contract as the result of fraud, undue influence, or overweening bargaining power, (2) whether the forum is so gravely difficult and inconvenient that the complaining party will for all practical purposes by deprived of its day in court, and (3) whether enforcement of the clause would contravene a strong public policy of the forum in which the suit was brought. *Argueta,* 87 F.3d at 325.

The relevant factor for the court to consider here is whether Plaintiffs will for all practical purposes be deprived of their day in court if the forum selection clause in the SCIP Articles of Association is enforced. Both parties acknowledge that Panonia either is presently engaged or has engaged in litigation against SCIP in French Polynesia. Thus, there is little doubt that a court in French Polynesia could and would assume jurisdiction over SCIP, which is a partnership organized under the law of Bora Bora, French Polynesia. (Compl. at ¶ 17.) However, as noted above, SCIP, although named in the instant suit, has not yet appeared before the court. The only defendants presently at issue are the Goldens, and the court finds considerable doubt as to whether a French Polynesian court would or could assume jurisdiction over these defendants.

In response to Plaintiffs concern regarding the jurisdictional issue (Resp. at 10-11), the Goldens simply state: "Plaintiffs should not be allowed to offer conclusory statements concerning the procedural law of a foreign territory." (Reply (Dkt. # 22) at 5.) The Goldens provide no substantive response or evidence which would indicate that they would be subject to jurisdiction in French Polynesia. Neither have the Goldens expressed or acknowledged in any of their pleadings before this court any willingness to voluntarily submit to the jurisdiction of the French Polynesian court. Although Plaintiffs bear the burden of showing why enforcement of the forum selection provision would be unreasonable,[10] it is sufficient that Plaintiffs have raised serious and legitimate concerns

[10] The party seeking to avoid the consequences of a forum selection clause bears "a heavy burden of proof." *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 592 (1991).

related to obtaining personal jurisdiction over the Goldens in French Polynesia, which the Goldens all but ignore in their Reply.[11] *See APL Co. v. Kemira Water Solutions, Inc.*, No. 09-3967 SC, 2010 WL 841285, at *6 & n.8 (N.D. Cal. Mar. 10, 2010) (declining to enforce forum selection clause on similar grounds). The court is persuaded that because it is doubtful that a French Polynesian court would have jurisdiction over the only defendants presently before the court, there is a significant risk that Plaintiffs will be deprived of their day in court if the clause is enforced. Therefore, dismissal here based on this forum selection clause would be unreasonable, and the court denies the Goldens' motion.

F. Forum Non Conveniens

The Goldens seek dismissal on grounds of forum non conveniens. (Mot. at 11-12.) The Goldens have the burden to demonstrate (1) the existence of an adequate alternative forum, and (2) that the balance of private and public interest factors favor dismissal. *See Loya v. Starwood Hotels & Resorts Worldwide, Inc.*, 583 F.3d 656, 664 (9th Cir. 2009); *Dole Foods Co. v. Watts*, 303 F.3d 1104, 1118 (9th Cir. 2002). The private interest factors include: (1) the relative ease of access to sources of proof, (2) the availability of compulsory process for attendance of hostile witnesses, and cost of obtaining attendance of willing witnesses, (3) the possibility of viewing subject premises,

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[11] Further, in the context of a Rule 12(b)(3) motion, the court "must draw all reasonable inferences in favor of the non-moving party and resolve all factual conflicts in [that party's] favor." *Murphy*, 362 F.3d at 1138. Under this standard, Plaintiffs have met their burden. The factual conflict over whether French Polynesian courts could or would assume jurisdiction over the Goldens must be resolved in Plaintiffs' favor.

and (4) all other factors that render trial of the case expeditious and inexpensive. *Loya*, 583 F.3d at 664. The public interest factors include: (1) administrative difficulties flowing from court congestion, (2) the imposition of jury duty on the people of a community that has no relation to the litigation, (3) local interest in having localized controversies decided at home, (4) the interest in having a diversity case tried in a forum familiar with the law that governs the action, and (5) avoidance of unnecessary problems in conflicts of law. *Id.*

The court has broad discretion in deciding a motion based on forum non conveniens. *EFCO Corp. v. Aluma Sys. USA, Inc.*, 268 F.3d 601, 603 (8th Cir. 2001). Forum non conveniens is an exceptional tool to be employed sparingly, not a doctrine that compels plaintiffs to choose the optimal forum for their claim. *Mujica*, 381 F. Supp. 2d at 1140 (quoting *Dole Foods*, 303 F.3d at 1118 (internal quotation marks omitted)). A district court considering a forum non conveniens motion must decide "whether defendants have made a clear showing of facts which establish such oppression and vexation of a defendant as to be out of proportion to plaintiff's convenience, which may be shown to be slight or nonexistent." *Boston Telecomms. Group, Inc. v. Wood*, 588 F.3d 1201, 1206 (9th Cir. 2009) (quoting *Dole Foods*, 303 F.3d at 1118) (internal quotation marks omitted). The Goldens have not met this heavy burden here.

"There is a substantial presumption in favor of a plaintiff's choice of forum." *Agudas Chasidei Chabad v. Russian Fed'n*, 528 F.3d 934, 950 (D.C. Cir. 2008). Indeed, "courts have been reluctant to apply the doctrine of forum non conveniens if its application would force an American citizen to seek redress in a foreign court." *Paper*

Operations Consultants Int'l, Ltd. v. SS Hong Kong Amber, 513 F.2d 667, 672 (9th Cir. 1975) (internal quotations omitted). In addition, the court considers the possibility that Dr. Putz chose this forum in order to obtain personal jurisdiction over the Goldens. *See Mujica*, 381 F. Supp. 2d at 1141. "The more it appears that a . . . plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference will be given to the plaintiff's forum choice." *Id.* (quoting *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 71-72 (2d Cir. 2001) (en banc)). Dr. Putz has already had one action in the Western District of Virginia against the Goldens dismissed as a result of lack of personal jurisdiction. (*See* Compl., Ex. G.) By filing in the Western District of Washington, the Goldens' home district, Dr. Putz could ensure the availability of personal jurisdiction over these defendants in this action.

In any event, as a threshold matter, the Goldens have failed to demonstrate that French Polynesia is an available forum. Although it is clear that Dr. Putz has brought suit against SCIP in French Polynesia, there is no indication that the Goldens would be subject to suit there or that they consent to jurisdiction there. Failure to demonstrate that they are amendable to service of process in French Polynesia is fatal to their assertion of forum non conveniens. *See Williams v. Wilson*, No. 05 C 227 S, 2005 WL 2100980, at *2 (W.D. Wis. Aug. 30, 2005). Whether Dr. Putz is able to sue SCIP in French Polyneisa is not the issue the court must determine when deciding whether or not to dismiss Dr. Putz's claims against the Goldens on ground of *forum non conveniens*. All defendants, not just one or a portion, must be come within the jurisdiction of the alternative forum. *See Dole Foods*, 303 F.3d at 1118-19; *see also* 15 Wright, Miller & Cooper, Federal

Practice & Procedure§ 3828 at 179 (dismissal predicated on forum non conveniens requires availability of alternative forum possessing jurisdiction as to all parties). Since the Goldens did not address their amenability to service of process in French Polynesia, they have not persuaded the court that an alternate forum exists.

Even if the Goldens had demonstrated that French Polynesia is an alternative forum, the court determines nonetheless that the action should remain in this district after balancing the private and public factors. The remaining relevant private and public factors weighing in favor of and against transfer are split relatively evenly. As the Goldens point out, SCIP, the other named defendant in this action, is located in Bora Bora, French Polynesia, and Bunglow # 12 is located in French Polynesia as well. (*See* Compl. at ¶ 20.) Witnesses and documents regarding the repairs and improvements that Dr. Putz claims to have made to the bungalow, and the alleged disrepair and diminished value since his alleged ouster from SCIP are likely located there. On the other hand, Dr. Putz alleges that the remaining parties and primary witnesses are located in the United States, including the Goldens, Dr. Putz, and SCIP Chief Executive Officer Francois Ergas, who resides in, and is a domiciliary of California. (Compl. at ¶¶ 14-17.) With regard to public interest factors, there is no undue burden in having a controversy involving Washington residents decided by jury here. Further, there is a strong interest in having a controversy involving Washington residents decided here. *See, e.g., Carideo v. Dell, Inc.*, 706 F. Supp. 2d 1122, 1129 (W.D. Wash. 2010) (Washington has a "strong interest in protecting its citizens under its laws."). The court is also practiced in applying Washington law, which Dr. Putz alleges will predominate the case. (Resp. at 15.) All in

all, the remaining forum non conveniens factors split fairly evenly. Because the Goldens bear the burden of demonstrating that an alternate forum would be more convenient, an even split does not favor dismissal.

Considering that Washington is their residence, the Goldens cannot demonstrate that this is a vexatious forum for them. The court is to accord deference to Dr. Putz's forum, particularly here where the evidence suggests that Dr. Putz chose this forum in order to ensure personal jurisdiction over the Goldens. The Goldens have failed to demonstrate that they are amenable to service in French Polynesia, and failed to demonstrate that the relevant private and public factors weigh in favor of conducting the litigation in French Polynesia. The court denies the Goldens' motion to dismiss based on forum non conveniens.

G. Statute of Limitations, Equitable Tolling, and the Discovery Rule

The Goldens have asserted that Plaintiffs' claims for breach of contract, breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, intentional interference with property, and intentional interference with business expectancies are barred by the applicable statutes of limitations.[12] They argue that the

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[12] The statute of limitations in Washington for breach of contract is six years. RCW 4.16.040(1). A three-year statute of limitations applies to claims for breach of the duty of good faith and fair dealing, negligent misrepresentation, intentional interference with property or trespass, and intentional or tortious interference with business expectancy. *See Steinberg v. Seattle-First Nat'l Bank*, 832 P.2d 124, 125 n.4 (Wash. Ct. App. 1992) (duty of good faith and fair dealing & intentional interference with business expectancy); RCW 4.16.080 (negligent misrepresentation & intentional trespass).

statutes of limitation with regard to events surrounding a 1987 contract have long since expired. (Mot. at 12-15, 17, 20.)

In response, with regard to their breach of contract claim, Plaintiffs allege alternatively that the Goldens did not breach their contract until 2008 when they allegedly refused to continuing assisting in completing the transfer of the SCIP shares or Bungalow # 12 to Plaintiffs (*see* Compl. at ¶ 47), or that equitable tolling or equitable estoppel applies to prevent the statute of limitations from barring their claims (Resp. at 18-19).[13] A district court may grant a motion to dismiss on statute of limitations grounds "only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." *Morales v. City of Los Angeles*, 214 F.3d 1151, 1153 (9th Cir. 2000) (quoting *Tworivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999)). "Generally, the applicability of equitable tolling depends on matters outside the pleadings, so it is rarely appropriate to grant a Rule 12(b)(6) motion to dismiss . . . if equitable tolling is at issue." *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 1003-04 (9th Cir. 2006) (citing *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206 (9th Cir. 1995)); *see Cervantes v. City of San Diego*, 5 F.3d 1273, 1276 (9th Cir. 1993)

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[13] Plaintiffs also assert that the discovery rule applies to toll the statute of limitations with regard to their breach of contract claim. (Resp. at 16-17.) This argument fails. The Washington Supreme Court has strictly limited application of the discovery rule in breach of contract cases. In *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 146 P.3d 423, 430-31 (Wash. 2006), the Court held that the Washington Court of Appeals lacked authority to extend the discovery rule to a breach of contract action, but nevertheless applied the discovery rule "to construction contract actions where latent defects are alleged." The contract here does not fall within this limited category, and as such the discovery rule is inapplicable.

(providing that application of equitable tolling "is not generally amenable to resolution on a Rule 12(b)(6) motion").

"Equitable tolling is a legal doctrine that allows a claim to proceed when justice requires, even though it would normally be barred by the statute of limitations." *Troztzer v. Vig*, 203 P.3d 1056, 1062 n.9 (Wash. Ct. App. 2009). In Washington, the predicates for application of the doctrine of equitable tolling are (1) bad faith, deception, or false assurances by the defendant, and (2) the exercise of diligence by the plaintiff. *Id.* at 1062 (citing *Millay v. Cam*, 955 P.2d 791, 797 (Wash. 1998)).

Plaintiffs have alleged numerous false assurances by Defendants. For example, Plaintiffs allege that the Golden assured them in 1987 that they had obtained the necessary SCIP Board approval and had properly transferred the 18 shares. (Compl. at ¶ 28.) Plaintiffs also have alleged that the Goldens reiterated these reassurances in 2005, and even executed an affidavit so attesting. (*Id.* at ¶ 43.) In the intervening years, Plaintiffs allege that SCIP treated them in every way as if they were the owners of the 18 shares, including charging them for association and maintenance fees, inviting them to shareholder meetings (*id.* ¶¶ 31, 33), and even electing Dr. Putz as President of the SCIP Board of Directors (*id.* Ex. F at 10). The court cannot say that these "assertions . . . , read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." *Morales*, 214 F.3d at 1153. These allegations are sufficient to withstand a motion to dismiss based on the statute of limitations.

In addition to equitable tolling, the discovery rule may also apply to toll the applicable statute of limitations with regard to Plaintiffs' remaining tort claims. *See, e.g.*,

Sabey v. Howard Johnson & Co., 5 P.3d 730, 739 (Wash. Ct. App. 2000) (applying discovery rule to negligent misrepresentation); *Allyn v. Boe*, 943 P.2d 364, 373 (Wash. Ct. App. 1997) (applying discovery rule to timber trespass, and collecting other cases applying doctrine to actions involving "tortious injury to real property"). Under the discovery rule, the statute of limitations does not begin to run until a plaintiff discovers or reasonably could have discovered all the essential elements of the cause of action. *See Allyn*, 943 P.2d at 372. Again, similar to the court's analysis above concerning equitable tolling, Plaintiffs allegations are sufficient to support application of the discovery rule, and to withstand a motion to dismiss based on the statute of limitations. Further discovery may reveal facts suggesting that the exceptions of equitable tolling or the discovery rule should not apply, but the court expresses no opinion regarding the proper outcome at this stage of the litigation. The Goldens' motion to dismiss based on expiration of the statute of limitations is denied.

H. Economic Loss Rule/Independent Duty Doctrine

The Goldens also have moved to dismiss Plaintiffs' tort claims for negligent misrepresentation, intentional interference with property or trespass, and intentional or tortious interference with business relations on the basis of the economic loss rule. (Mot. at 15-16, 18-20.) On November 4, 2010, while the Goldens' motion was pending, the Washington Supreme Court issued two new decisions reinterpreting its prior jurisprudence with regard to the economic loss rule, and announcing a new rule denominated the "independent duty doctrine." *See Eastwood v. Horse Harbor Found., Inc.*, ___ P.3d ___, No. 81977-7, 2010 WL 4361986 (Wash. Nov. 4, 2010) & *Affiliated*

FM Ins. Co. v. LTK Consulting Servs., Inc., ___ P.3d ___, No. 82738-9, 2010 WL 4350338 (Wash. Nov. 4, 2010).

Over the years, courts have interpreted the Washington Supreme Court's jurisprudence on the economic loss rule broadly to "prevent recovery in tort" by parties to a contract when the parties "had an opportunity to allocate the risk of loss" that is the basis of their tort claim in their contract. *See Alejandre v. Bull*, 153 P.3d 864, 870 (Wash. 2007). In *Eastwood*, the Washington Supreme Court acknowledged that this broad reading of its prior jurisprudence was "understandable," but nevertheless changed course – modulating not only its formulation, but its nomenclature as well. Now denominated the "independent duty doctrine," the new formulation in Washington is as follows:

> An injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract. The court determines whether there is an independent duty of care, and the existence of a duty is a question of law and depends on mixed considerations of logic, common sense, justice, policy and precedent.

Eastwood, 2010 WL 4361986 at *4 (Fairhurst, J., with two Justices concurring, two Justices concurring in the result, and four Justices concurring separately) (internal quotation marks omitted).[14] *Eastwood* rejects the argument that an economic loss cannot be recovered in tort whenever it arises out of a relationship governed by contract.

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[14] The *Eastwood* decision is actually comprised of three opinions: the opinion of the court authored by Justice Fairhurst with two additional Justices joining, a concurring opinion authored by Justice Chambers, with three additional Justices joining, and a second concurring opinion authored by Justice Madsen. *See Eastwood*, 2010 WL 4361986. Likewise, the *Affiliated FM* decision is actually comprised of three opinions: the opinion of the court again authored by Justice Fairhurst, a concurring opinion authored by Justice Chambers, and a concurring and dissenting opinion authored by Justice Madsen. *See Affiliated FM*, 2010 WL 4350338.

Eastwood, 2010 WL 4361986, at *4 ("[T]he fact that an injury is an economic loss or the parties also have a contractual relationship is not an adequate ground, by itself, for holding that a plaintiff is limited to contract remedies.). Indeed, in both *Eastwood* and *Affiliated FM*, the Washington Supreme Court found that a well established tort duty existed independent of the contract. *Eastwood*, 2010 WL 4361986, at *2-*3, *10 (finding lessee under duty not to commit waste to property); *Affiliated FM*, 2010 WL 4350338, at *5 (finding engineer performing maintenance work under a common law duty of care due to significant public interest in safety).

Yet, while narrowing the class of claims precluded by the economic loss rule (now the independent duty doctrine), the Washington Supreme Court reaffirmed that the fundamental policy behind the economic loss rule – protecting contractual expectations – remains a principal policy consideration:

> An initial policy consideration is the usefulness of private ordering. We assume private parties can best order their own relationships by contract. The law of contracts is designed to protect contracting parties' expectation interests and to provide incentives for parties to negotiate toward the risk distribution that is desired or customary. . . . In contrast, tort law is a superfluous and inapt tool for resolving purely commercial disputes. . . . If aggrieved parties to a contract could bring tort claims whenever a contract dispute arose, certainty and predictability in allocating risk would decrease and impede future business activity.

Affliated FM, 2010 WL 4350338, at *4 (internal quotation marks and citations omitted).

While neither *Eastwood* nor *Affiliated FM* involved the specific tort claims alleged here, the Supreme Court's opinion in *Eastwood* specifically recognizes that damages for tortious interference with another's business expectancies and negligent misrepresentation may be recoverable "even if they arise from contractual relationships."

Eastwood, 2010 WL 4351986, at *4 (citing *Commodore v. Univ. Mech. Contractors, Inc.*, 839 P.2d 314, 322 (Wash. 1992), and *ESCA Corp. v. KPMG Peat Marwick*, 959 P.2d 651 (Wash. 1998), respectively). While this court does not believe that this means that such tort claims will always survive in the context of a contractual relationship between the parties, the court can find no reason under the Washington Supreme Court's revised guidance on this issue to bar Plaintiffs' tort claims here.

The parties' contractual relationship, based on their 1987 agreement to transfer 18 shares of SCIP from the Goldens to the Plaintiffs in return for the sales price, is distinct from the Goldens' alleged duty to refrain from tortiously interfering with or trespassing on Plaintiffs' property rights, or tortiously interfering with Plaintiffs' future business relationships in terms of rentals for Bunglaow # 12. In fact, these duties would exist even if the Plaintiffs had purchased the SCIP shares from another source.

Further, at the time of the parties' 1987 contract, Mr. Golden was a member of SCIP's Board of Directors. (Compl. at ¶ 28.) Certainly, as a member of the Board, and with knowledge that Dr. Putz was relying upon his representations, Mr. Golden would have had a duty, independent of any contractual obligation, to refrain from negligently misrepresenting any action taken or approval issued by the Board.

Finally, there is nothing on the face of the pleadings to indicate that the parties were sophisticated commercial players attempting to forecast or allocate their risk of loss solely within the confines of their 1987 contract. To the contrary, the contract attached as an exhibit to the complaint evinces a distinct lack of commercial sophistication. (*See* Compl., Ex. A.) Under these circumstances, the court's preference of "private ordering"

and limiting the parties to their contractual remedies is less compelling. Taking into consideration all of these mixed factors of "logic, common sense, justice, policy and precedent," the court finds that Plaintiffs' tort claims are not barred under the more relaxed standard of Washington's new independent duty doctrine. The Goldens' motion for dismissal based on the economic loss or independent duty doctrine is denied.

I. Failure to State Valid Causes of Action for Trespass and Tortious Interference with Business Expectancies

The Goldens allege that Plaintiffs have failed to state valid causes of action for intentional interference with property (or trespass) and tortious interference with business expectancies, and that these claims should be dismissed. (Mot. at 16-17, 19-20.) As discussed below, Plaintiffs state valid claims, and the court denies the Goldens' motion.

Contrary to the Goldens' assertions, Plaintiffs have alleged a valid cause of action for trespass. Construing the complaint in the light most favorable to them, the court finds that Plaintiffs have alleged that they have been improperly ousted by SCIP from Bungalow # 12 (*see* Compl. at ¶¶ 10-11, 46), and that the Goldens have taken possession of Bungalow # 12, refused to relinquish it, refused to abate Plaintiffs' ouster, and have done so intentionally (*id.* at ¶¶ 11-12, 47-51). On the basis of these allegations, Plaintiffs state a valid cause of action for intentional interference with property or trespass.

The Goldens argue that a party to a contract cannot be liable in tort for breaching its own contract. (Mot. at 19 (citing *Houser v. Redmond*, 559 P.2d 577 (Wash. Ct. App. 1977), *aff'd*, 586 P.2d 482 (Wash. 1978) ("[D]efendant's breach of his own contract with the plaintiff is of course not a basis for the tort.").) The court agrees, and if this were the

sole allegation with regard to Plaintiffs' tortious interference claim, then the claim would require dismissal. However, it is not the 1987 contract between the parties with which Plaintiffs assert that the Goldens have interfered. Reading the complaint in a light most favorable to them, the court finds that Plaintiffs allege that the Goldens are interfering with Plaintiffs' ability to continue contracting with others to rent Bungalow # 12. (Compl., ¶¶ 46, 48-50 85-94.) Specifically, Plaintiffs have alleged that the Goldens' "intentional interference with Plaintiffs' rental business expectations," has resulted in "lost rental profits, . . . emotional damages," and diminution in the value of property value. (*Id.* at ¶ 94.) The Goldens' motion to dismiss Plaintiffs' claim for tortious interference is, therefore, denied.[15]

J. Declaratory Judgment

The Goldens assert that Plaintiffs' claim for declaratory judgment should be dismissed on the same grounds of forum non conveniens, forum selection clause, and statute of limitations as asserted for the underlying claims discussed above. (Mot. at 21-

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[15] Throughout their motion, the Goldens assert or imply that Plaintiffs are estopped or that this court is somehow bound by various factual findings of the Western District of Virginia when it issued its order dismissing the Plaintiffs' action for lack of personal jurisdiction over the Goldens. (*See* Mot. at 13-14, 16-17, 19-20.) The court disagrees. The fact that a court takes evidence for the purpose of deciding a jurisdictional issue does not mean that those factual findings are binding in future proceedings. *See Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990) ("The *res judicata* effect of a 12(b)(1) motion is . . . limited to the jurisdictional issue."); Charles A. Wright & Arthur R. Miller, 5B *Federal Practice and Procedure* § 1350 (3d ed.) ("In as much as a Rule 12(b)(1) motion basically is one in abatement, a dismissal is not a decision on the merits and has no res judicata effect. . . .") (footnotes omitted). Where a court takes evidence for a limited purpose of ruling on jurisdiction, the preclusive effect of such findings is limited to the issue decided. *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). Thus, neither this court, nor the parties, are bound by the factual findings of the court in the Western District of Virginia, except as they relate to the narrow issue of whether there was personal jurisdiction over the Goldens in that district.

22.) Because the court has denied the Goldens' motion on these grounds with respect to the underlying causes of action, it also denies the Goldens' motion with respect to Plaintiffs' claim for declaratory relief.

IV. CONCLUSION

For the foregoing reasons, the court DENIES the Goldens' motion to dismiss (Dkt. # 10), and DENIES the Plaintiffs' motion for leave to file a supplemental affidavit (Dkt. # 24).

Dated this 7th day of December, 2010.

JAMES L. ROBART
United States District Judge